NAN TUN

v.

JOHN AHWANG PANGGAU

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[SUIT NO: 22-191-1998-II]
22 SEPTEMBER 2004

CIVIL PROCEDURE: *Absence of plaintiff and his counsel - Adjournment refused - Case dismissed - Action struck out - Application to restore writ of summons - Rules of the High Court 1980, O. 35 r. 2(1) - Judicial exercise of discretionary power - Whether judge was right in refusing plaintiff's request for adjournment and in striking out plaintiff's action - Unexpected resignation of counsel having charge of plaintiff's action - No resident advocate in firm - Plaintiff's failure to comply with case-management directions - Prejudice to defendant - Disrespect to court*

CIVIL PROCEDURE: *Adjournment - Application for - Principles and considerations - Plaintiff requesting adjournment one day before trial - Facsimile of letter seeking adjournment sent to court on eve of trial day - Whether request for adjournment made too late - Delay and prejudice to defendant - Disrespect to court*

This was an application by the plaintiff under O. 35 r. 2 Rules of the High Court 1980 ('RHC') to have his writ of summons restored or reinstated. The plaintiff's action had earlier been struck out by the learned judge on the ground that neither the plaintiff nor his counsel was present in court on the day fixed for the commencement of the trial (5 April 2004). In allowing the defendant's application to strike out the plaintiff's action, the learned judge also found that the plaintiff had failed to comply with the court's direction to the parties to exchange witness-statements one month before the trial date. The principal grounds advanced in support of the plaintiff's present application were: (i) that counsel for the plaintiff ('Mr BK') had resigned unexpectedly on 1 April 2004 and the firm had had to look for a new resident-advocate; (ii) that the firm had no resident-advocate in Kuching to handle the plaintiff's case on 5 April 2004; (iii) that the firm was unable to find an advocate to appear on its behalf on that particular day due to the short notice of resignation given by Mr BK; (iv) that a letter dated 4 April 2004 seeking an adjournment and for the

attendance of counsel to be dispensed with had been sent to the deputy registrar of the High Court at Kuching; (v) that there were triable issues and that a substantial amount of work had been done in the conduct of the case; (vi) that no prejudice would be caused to the defendant that could not be compensated by costs; and (vii) that no disrespect was ever intended to be shown to the court.

Held (dismissing the plaintiff's application):

[1] The power in Order 35 r. 2(1) RHC is purely discretionary at the instance of the court. The judicial discretion herein is *prima facie* unfettered and the judge will exercise it solely upon his view of the facts. The [related] question to be asked is whether, on the facts, there are sufficient reasons to refuse the adjournment sought. (pp 642 a-d & 643 b)

[2a] Although Mr BK only tendered his resignation on 1 April 2004, *ie*, four days before the trial date on 5 April 2004, the firm ought **not** to have waited until 2.11pm on 4 April 2004 to send a facsimile of the letter (seeking an adjournment) to the court. It was most presumptuous of the firm to have faxed the said letter to the court at the eleventh hour. (p 643 c-e)

[2b] The firm's excuse that it was unable to find an advocate in the whole of Kuching to stand in for it was lame and unacceptable. (p 643 f-g)

[2c] The plaintiff had also failed to comply with the court's case-management directions to the parties to exchange witness-statements one month before the trial date. The conduct of the plaintiff's action had thus far been contumacious and contumelious, and the defendant should not be further prejudiced by any more delays. Consequently, the adjournment sought by the plaintiff had to be denied, as otherwise, the court could be construed as condoning disrespectful behaviour, which it must not be seen to be tolerating. (pp 644 e, g-h & 645 a)

[2d] Contrary to the plaintiff's assertion, it also did not appear to the court that a substantial amount of work had been done respecting the preparation of the plaintiff's action for trial. Indeed, it would appear that the plaintiff was not ready for trial on 5 April 2004 or even interested in pursuing his claim. (p 645 b-c)

[Application to restore writ of summons dismissed.]

Case(s) referred to:
Dick v. Piller [1943] 1 All ER 627
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(foll)***
Maxwell v. Keun & Ors [1928] 1 KB 645
Mohanlal Gordhandas Sheth v. Ban Guan & Co [1956] MLJ 13

Legislation referred to:
Rules of the High Court 1980, O. 35 r. 2

For the plaintiff - Louis Jarau Patrick; M/s Tang & Antau
For the defendant - Anthony Bong; M/s Satem, Chai & Dominic Lai

Reported by Gan Peng Chiang

JUDGMENT

Lau Bee Lan JC:

Background

This is an appeal by the plaintiff against my decision made on 23 June 2004 wherein I had struck out the plaintiff's application to restore or reinstate the writ of summons pursuant to O. 35 r. 2 of the Rules of the High Court 1980 ("the RHC") (encl. 62) (hereinafter referred to as "the Application for Restoration").

The Application for Restoration is supported by the affidavit in support of Mr. Louis Jarau anak Patrick affirmed on 10 April 2004 ("LJP's Affidavit") stating the reasons for seeking restoration which I shall refer to in due course. It is not disputed that the plaintiff has filed the Application for Restoration within the seven days' time limit having filed the application on 10 April 2004.

This Application for Restoration stems from my decision ordering that the plaintiffs action be dismissed or more appropriately be struck out with costs on 5 April 2004. The date, 5 April 2004, was the day fixed for the commencement of trial scheduled for four (4) days until 8 April 2004.

On the said date, at 11.42am, only Mr. Anthony Bong, counsel for the defendant was present in court with his witnesses, the defendant and his wife. However, the counsel for the plaintiff from M/s. Tang & Antau Co., advocates was not present and neither was the plaintiff present. Learned counsel for the defendant applied to the court to dismiss the plaintiff's

claim with costs in view of the reckless indifference shown by the plaintiff in not complying with the court's directions to exchange witness statements one (1) month before the trial date and in not attending the court for trial.

In the exercise of my discretion, I had allowed counsel for the defendant's application to dismiss the plaintiff's action with costs to be taxed unless agreed for the reasons which were summarily recorded in my Notes of Proceeding on 5 April 2004 as follows:

> Court:
>
> This case is fixed for trial from 5th to 8th April 2004; directions for Witness Statements to be exchanged simultaneously one month before trial date were given on 31st December 2003. Plaintiff and no Counsel from firm of Messrs. Tang & Antau Co. Adv. are present save for a faxed letter dated 4th April 2004 received by the Court only this morning (5th April 2004) from the said firm seeking for an adjournment of the matter and for the attendance of the Counsel to be dispensed with for the reason that Mr. Bunsi Kasin, the previous Counsel has left the employment of the firm from 1st April 2004 and the new resident solicitor for Kuching office, Mr. Louis Jarau Patrick will only commence working with the company on 5th May 2004.

The reasons proffered by the plaintiff in seeking to restore the action as averred in LJP's affidavit are essentially:

(1) The previous counsel handling the case, Mr. Busni Kasin, had suddenly resigned from the firm of M/s. Tang & Antau Co., Advocates, Kuching on 1 April 2004 and the firm has to look for a new resident advocate.

(2) There was no resident advocate for the firm in Kuching to handle the case on 5 April 2004 and Mr. Louis Jarau ak Patrick though due to commence employment with the firm on 5 May 2004 was instructed to commence employment earlier with the firm on 8 April 2004 due to unforeseen circumstances.

(3) Plaintiff's solicitor firm could not get any solicitor in Kuching to appear on their behalf on the trial date due to the short notice of the resignation of the previous counsel having conduct of the case.

(4) A letter dated 4 April 2004 seeking for an adjournment of the trial and for attendance of counsel to be dispensed with was sent to the deputy registrar of High Court II, Kuching as per exh. LJ1. I shall be reverting to this matter hereafter.

(5) There was no intention to be disrespectful to the court when no counsel for the plaintiff appeared on 5 April 2004.

(6) There are triable issues in the action and substantial amount of work has been done for the preparation and conduct of the action.

(7) No prejudice would be caused to the defendant if the action was restored which could not be compensated with costs.

In opposing the Application for Restoration, the learned counsel for the defendant submitted that the plaintiff was not *bona fide* and that the reason that there was no resident advocate at the material time was without merit since the Kuching firm is a branch of the main office at Bintulu and on the firm's letterhead, four (4) lawyers were listed namely – (a) John Antau Linggang (b) Edward Moal Juga (c) Louis Jarau Ak Patrick (d) Charles John Antau. Learned counsel further submitted that anyone of the four lawyers should have been present in court on 5 April 2004 and it was a matter of professional duty and under the Advocates Ordinance, a firm must ensure that there must always be an advocate practising in a firm.

Regarding the issue of the availability of an advocate from the firm of M/s. Tang & Antau Co., advocates on 5 April 2004, the plaintiff *vide* his affidavit in reply affirmed on 27 May 2004 rebutted wherein Mr. Louis Jarau ak Patrick submitted that he was the only resident advocate at the firm of M/s. Tang & Antau Co., Adv., Kuching and he commenced employment only on 8 April 2004 (earlier than expected) whilst Mr. John Antau Linggang is the only resident advocate at the main office in Bintulu.

Learned counsel for the defendant further submitted that there must be merits shown and the defendant has been prejudiced by being dragged to court and on 5 April 2004 itself had waited for three hours.

Issue

The issue before the court was whether I had exercised my discretion properly in dismissing the Application for Restoration, ie, the crux of which is whether I was right in not granting the adjournment sought by M/s. Tang & Antau Co., Advocates *vide* their faxed letter dated 4 April 2004.

Findings And Evaluation

At the outset, I wish to state that both the counsel for the plaintiff and the defendant did not cite any authorities to support or to oppose the Application for Restoration save for counsel for the plaintiff who cited O. 35 r. 2 of the RHC upon which he premised the Application for Restoration. Order 35 r. 2 of the RHC provides:

> 2 Judgment, etc given in absence of party may be set aside (O. 35 r. 2)
>
> (1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.
>
> (2) An application under this rule must be made within 7 days after the trial. (emphasis added)

The operative words "Any order ... may be set aside by the court ... on such terms as it thinks just" are significant as they unequivocally point to the fact that the court in such an application exercises its discretionary power whether to set aside the order with or without any conditions or to refuse to set aside the order.

Suffice for me for purposes of determining the Application for Restoration to cite the Federal Court case of *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187. In *Lee Ah Tee v. Ong Tiow Pheng & Ors (supra)*, the appellant, took a s. 181 petition under the Companies Act 1965 as a shareholder of a company and alleged mismanagement, misappropriation of company funds, fraud, embezzlement and general disregard for the rules of the company. The learned J.C. dismissed the application and one of the grounds of appeal was that the learned J.C. erred in denying the appellant the adjournment he sought when the case came up for continued hearing on the final date for the reason that he wished to engage new counsel. The opposing parties objected to the request for adjournment because there were several of such last minute applications made previously. The Federal Court, *inter alia*, upheld the learned J.C.'s decision in refusing the request for a further adjournment.

His Lordship Hashim Yeop A. Sani (as he then was) (delivering judgment on behalf of the Federal Court) at p. 189 f to h elucidated the following principles to be considered when exercising discretion whether to allow or refuse an adjournment as:

(1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. **He would exercise the discretion solely upon his view of the facts.**

(2) *Prima facie* **this discretion is unfettered.**

(3) The question to ask in any particular case is **whether on the facts there are adequate or sufficient reasons to refuse the adjournment.**

(4) Although an appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.

(5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion. (emphasis added)

The aforesaid principles which were approved and adopted by the Federal Court are referred to in the English Court of Appeal case of *Dick v. Piller* [1943] 1 All ER 627 which the Federal Court observed, dealt at length on the point of exercise of the discretion of the judge to allow or refuse an application for adjournment.

Of pertinence also is the dictum of Atkin LJ in *Maxwell v. Keun & Ors* [1928] 1 KB 645 referred to by the Federal Court in the course of its judgment. I wish to add that it was noted by the Federal Court in *Lee Ah Tee (supra)* that *Maxwell v. Keun & Ors.* was cited with approval in a local Court of Appeal case of *Mohanlal Gordhandas Sheth v. Ban Guan & Co.* [1956] MLJ 13. The Federal Court expressed that some important guidelines which could be gleaned from *Maxwell*'s case *(supra)* found at pp. 653 and 657 respectively are:

> The Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so.

> In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion. (emphasis added)

I am conscious of the fact that some of the principles alluded to in *Lee Ah Tee*'s case and in *Maxwell*'s case *(supra)* are in respect of the approach to be taken by an appellate court when deliberating on an appeal regarding the exercise of judicial discretion by a judge in the context of adjournment of a trial. Be that as it may, I am of the view that the legal principles are equally applicable for the purposes of determining the issue at hand.

I now turn to the facts of the present case. The previous counsel handling this case, Mr. Bunsi Kasin, tendered resignation only on 1 April 2004. Given that the firm only has one resident advocate at the main office in Bintulu as from 1 April 2004 to 5 April 2004 (the 1st day of trial), would it not be reasonable for the said firm to apply for an adjournment much earlier if the reasons which they seek to rely on are indeed *bona fide*.

The court viewed with grave concern the presumptuous attitude displayed by the firm of M/s. Tang & Antau Co., Advocates Kuching in faxing the letter dated 4 April 2004 (also similar to exh. LJ1 except for the facsimile transmission notes at the top of court's copy) to the court at the eleventh hour ie, on 4 April 2004 at 2.11pm which was only brought to my attention on 5 April 2004 at 8.15am, the day of the trial (encl. 60). By the said letter, the firm sought for an adjournment and dispensation of the presence of counsel, and were also presuming that the court will accede to their request.

The firm did not bother to get another counsel to stand in for them knowing that it is a trial fixed for a period of four days. To my mind, the inability to get another counsel in Kuching to stand in is indeed a lame excuse which is totally unacceptable. Why was the firm unable to get a counsel to assist them? I can only surmise that it is due to their careless and lackadaisical attitude of not acting promptly in the interest of their client but choosing to move only at the eleventh hour and it is no wonder therefore, why no assistance could be obtained from any other legal firm.

Apart from the question of the faxed letter, the court had also considered what had transpired before the matter was set down for trial. The court had fixed the case for Pre-Trial Case Management on 6 February 2003, 7 May 2003, 22 July 2003 and 31 December 2003. On 22 July 2003, the court specifically required the parties to prepare the following documents:

(a) Bundle of Documents, Agreed and Non-Agreed.

(b) Bundle of Pleadings.

(c) Issues to be tried.

(d) Agreed Facts, if any.

Taking cognisance of the fact that the case was a pre-2000 case and in heeding the clarion call by the Head of the Judiciary to attempt to dispose of pre-2000 cases by June 2004 or by the end of 2004, on 30 December 2003, the court rescheduled the trial date from 27 September 2004 to 1 October 2004 to an earlier date, ie, 5-8 April 2004 instead; and parties were directed to exchange witness statements (in affidavit form) simultaneously one month before the trial date.

Unfortunately, on the trial date not only were the witness statements not exchanged between the parties; but worse still, the plaintiff and his counsel were absent. As I have explained earlier, I find the reasons given by the counsel for the plaintiff seeking for an adjournment unacceptable and the absence of counsel deplorable.

Even if one is to peruse the court record, the then counsel for the plaintiff, Mr. Bunsi Kasin, had sought an adjournment on 7 May 2003 since he had difficulty in contacting the plaintiff and had even threatened to discharge himself. Notice for Directions were issued by the court as early as 10 July 1999 but no sealed order of Notice for Directions had been extracted. Even if the court is to discount that M/s. Tang & Antau Co., advocates became the solicitors for the plaintiff only on 2 October 2001 *vide* the Notice of Change of solicitors of the same date taking over from M/s. A.W. Kaya & Co., advocates, why did it take them so long to comply with the court's directions? Again, it showed the laidback and wanton attitude of counsel and plaintiff. Should the court allow the matter to drag on further to the prejudice of the defendant and after ample opportunity has been given to the plaintiff to get its case ready for trial? I am of the view that the plaintiff is guilty of contumacious and contumelious conduct which the court cannot condone. In the exercise of its discretion, the court could not

allow the adjournment because if the court was to do so, there is a danger that it may be construed to mean that the court was condoning disrespectful behaviour towards the court which by no means is to be tolerated. The averment by Mr. Louis Jarau that the plaintiff did not intend to be disrespectful is but a bare statement as the plaintiff's conduct showed otherwise.

With regard to the plaintiff's contention that there are triable issues and that a substantial amount of work has been done for the trial, I fail to see what "substantial work" has been done since there is no proof of exchange of the Bundle of Documents (Agreed and Non Agreed), Statement of Agreed Facts, Statement of Principal Issues to be tried, save for the statement of defence which was filed. Therefore, I am doubtful if the plaintiff was ready for trial on 5 April 2004 or for that matter interested in pursuing his claim. The plaintiff himself did not even bother to appear in court.

I am conscious of the fact that justice would have to be viewed in terms not only of the rights of the defendant but also that of the plaintiff. Here, I wish to reiterate that if any prejudice can be said to be caused to the plaintiff (which counsel for the plaintiff did not submit at all), in my view, it is the counsel for the plaintiff and the plaintiff himself who should bear the responsibility and shoulder the blame and no one else on account of their conduct which I have earlier elaborated.

Conclusion

For the foregoing reasons which I have adumbrated, I find that there are no good grounds for me to restore the writ of summons prayed for by the plaintiff. I accordingly struck out the Application for Restoration with cost to be taxed unless otherwise agreed.